Board of Alien Labor Certification Appeals

UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: February 25, 1997

CASE NO. 95-INA-251

In the Matter of:

BEST TRANSMISSIONS
Employer

on behalf of

JOSE G. PADILLA
Alien

Before: Huddleston, Holmes and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER,
Aministrative Law Judge

DECISION AND ORDER

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer (CO) of an application for alien labor certification. Certification of aliens for permanent employment in the United States is governed by §212 of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A) and Title 20, Part 656 of the Code of Federal Regulations (C.F.R.). Unless otherwise noted, all regulations cited in this decision refer to Title 20.

Employers desiring to employ an Alien on a permanent basis must demonstrate that the requirements of 20 CFR Part 656 have been met. These requirements include the responsibility to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review as contained in the appeal file (AF) and any written arguments. 20 CFR § 656.27(c).

STATEMENT OF THE CASE

The Employer filed an Application for Alien Employment

Certification (ETA 750 Part A) on July 9, 1993 to enable the Alien, a national of Honduras, to fill permanently the position of Auto Mechanic at a salary of $518.00 per week. Two years experience as an auto mechanic was required; no educational experience was required. The job offered was described as:

> REPAIRS FOREIGN/DOMESTIC AUTOS AS NEEDED - BRAKE TUNE-UPS-ELECTRICAL SYSTEM-USES HOIST/HAND TOOLS/WRENCHES. VALID CALIFORNIA DRIVERS LICENSE REQUIRED IN ORDER TO TEST AUTOS AFTER REPAIRS OR DRIVE CUSTOMERS WHEN AUTOS ARE LEFT IN SHOP FOR REPARATIONS. NON-SMOKING/DRINKING NOR DRUGS DURING WORK. ABLE TO DETERMINE WORK TO BE DONE WRITTEN VERIFIABLE REFERENCES. WORKS WEEKENDS/HOLIDAYS/NIGHTS IF REQUIRED.

Special requirements were listed as working equally on Toyotas, Datsuns, Mazdas and other cars including domestic models. AF 25. In Part B of the application, the Alien indicated that he had two years experience as an electric mechanic in Honduras, with special qualifications in repairing both foreign and domestic autos and complete engine and brake overhauls. AF 67.

Transmittals from the California Employment Development Department indicated that there were three U.S. applications for the position, all of which came from advertising in the Los Angeles Times on November 15-17, 1993. AF 39-41. Employer also posted the job within its premises from November 9-29, 1993. AF 35. Employer received the resumes of the three applicants and interviewed Lehung Nguyen, Mario Mendoza and Sohrab Schaud. The Employer stated in its letter of February 10, 1994 that all of the applicants were rejected because they did not have experience with transmissions. AF 36.

Notice of Findings. In the CO's April 5, 1994, Notice of Findings(NOF) he notified the Employer that the Department of Labor intended to deny the application for the reasons stated therein. The CO said that although the Employer contended that none of the U.S. applicants were qualified for the job as each was unqualified in transmission work, applicants Nguyen and Schaud stated that they possessed the requisite experience in working on automobile transmissions. AF 22. The CO then reminded the Employer that the ETA 750 Part A and the recruitment ads had not mentioned transmission work as a requirement for the job. The CO explained that the Employer could rebut this finding by showing with specificity why each U.S. worker was being rejected for job related reasons pursuant to 20 C.F.R. §§656.21(b)(6), 656.21(j)(1). AF 23.

Rebuttal. On May 5, 1994, the Employer's rebuttal stated that one of its main specialties is transmission repair services and explained that the work that it assigned to an auto mechanic would require knowledge of transmissions. AF 13-14. Employer stated that applicant Nguyen had no experience in transmissions,

but has "more theory practice" in transmissions. AF 13. Employer contended that Nguyen wanted Employer to pay him for time spent in on-the-job training, and that training this applicant would cost money and time plus the risk of his performing a "bad job and causing a lawsuit." AF 13. In addition, the Employer stated that applicant Schaud also has no experience in transmissions and had more experience in mechanical work on cars. Employer further stated that applicant Schaud also requested on-the-job training, but Employer could not afford to do so. AF 13.

Final Determination. The CO's September 20, 1994, Final Determination rejected Employer's rebuttal arguments as to the qualifications of applicants Nguyen and Schaud, and said that Employer's argument failed to change the NOF findings. AF 08-10. The CO explained that, while Employer's rebuttal was centered around the inexperience of the applicants with regard to working on automobile transmissions, "no mention of transmission experience" had been made in its application on Form ETA 750 A or in any of Employer's recruitment advertisements. AF 10. The CO concluded that it was not reasonable to reject applicants for lack of experience that is not mentioned in the ads inviting job applications. Consequently, rejecting applicants on the basis of undisclosed requirements was not acceptable. The CO stated that if transmission repair was, in fact, crucial to Employer's business, then his application and recruitment ad should have made mention of this fact. AF 10.

The CO concluded that Employer's inclusion of advertisement evidence that supports the transmission specialty compounded its error, leading to the conclusion that Employer failed to prove or to document that these applicants were rejected for lawful, job-related reasons pursuant to Section 656.24(b)(2)(ii). Based on these reasons the CO then denied the Employer's application for labor certification.

Review. On September 24, 1994, Employer requested a review of the CO's Final Determination. At that time the Employer also sought to readvertise and prove that this was a genuine job offer and that its requirements were based on business necessity. AF 02.

Discussion. Under 20 CFR § 656.21(j)(1)(iv), an employer must explain with specificity the lawful job-related reasons for not hiring each U.S. worker applicant. AF 10. The minimum job criteria for the Automobile Mechanic that Employer stated in ETA 750 Part A were two years experience as a Auto Mechanic, and no educational requirements were required. AF 25. Based on 20 CFR § 656.21(j)(1), the labor certification application was denied, because the Employer failed to establish that U.S. applicants Nguyen and Schaud were rejected lawfully, since it failed to

demonstrate that the U.S. workers could not perform the basic duties of the position at the time the application initially was considered.

We find U.S. applicants Nguyen and Schaud possessed these minimum requirements at that time, as each applicant stated that he possessed two years experience as an Auto Mechanic. Applicant Nguyen stated that he had eight years of experience as a Mechanic in Vietnam, with duties in car and truck general repair and maintenance. According to his resume, he completed the Gasoline and Diesel Automatic Mechanic Course at the DMC Automotive Training School. AF 57. Applicant Schaud asserted more than fifteen years of experience in automatic related fields, had an associate degree in Automotive (Gasoline and Diesel) from NTS and was ASE certified in repairing brakes. AF 44. On the other hand, in his follow up questionnaire, Mr. Schaud explained that he met all requirements of the job, including the transmission work now at issue. AF 22.

The Board has generally, held an applicant to be considered qualified, if he meets the minimum requirements specified for the job stated in the labor certification application. **United Parcel Service,** 90-INA-90(Mar. 28, 1991). This Employer's rejection of a U.S. worker who satisfies the minimum requirements specified both in its application (ETA 750 Part A) and in its advertisement for the position is unlawful. **American Cafe,** 90-INA-26(Jan. 24, 1991). In this case the Employer did not present new information or documentation to prove differently, and it did not deny that applicants Nguyen and Schaud possess the minimum stated job requirements. Consequently, we agree with the CO that the two U.S. workers who applied for this job, Mr. Nguyen and Mr. Schaud, possessed the stated minimum requirements for the Auto Mechanic position and that the Employer's rejection of these applicants for this position was contrary to law. **Sterik Company**, 93-INA-252(Apr. 19, 1994).

In addressing the Employer's contention that applicants Nguyen and Schaud were rejected because they did not have the required experience in transmissions, we observe that the CO correctly concluded in the Final Determination that the Employer cannot require a U.S. applicant to possess requirements not stated in the ETA Form 750 Part A or advertisement for the position. The minimum stated requirements for the position in this case were two years' experience as an Auto Mechanic, and the application made no mention of experience in transmission work. While Employer alleged that in 1993 it attempted to amend the advertisement to include transmission work as a requirement for the position, this is not credible because Employer's posted job advertisement in 1994 did not include any such requirement of transmission experience. We agree with the CO that Employer's rejection of applicants on the basis of undisclosed requirements

is not acceptable. For this reason, we conclude that Employer's rejection of U.S. workers solely because it believes these applicants do not possess transmission experience is unlawful because the Employer did not include any transmission experience requirement either in its application on Form ETA 750 Part A or in its recruitment advertisements.

Conclusion. The Employer contended in rebuttal that applicants Nguyen and Schaud were rejected as they possessed no experience with transmissions and desired on the job training, which the Employer refused to provide. AF 14. As the CO stated in the NOF, however, both U.S. applicants said they possessed the requisite two years of experience as an Auto Mechanic and that they had sufficient experience in transmissions to perform the duties of the offered position as an Auto Mechanic. AF 19.

While we acknowledge Employer's contention that transmission repair is essential and vital to his business, we agree with the CO that, if an Auto Mechanic is required to have experience with transmissions, the Employer should have stated this criterion in the application and in the recruitment advertisements. While the Employer contends that it should now be permitted to readvertise in order to include transmission experience, the resumes of both Nguyen and Schaud appear to possess the requisite transmission experience and the other minimum stated requirements. Allowing the Employer to alter its advertisements to include transmission experience would not change the finding that Employer rejected the U.S. workers reasons that were neither lawful nor job-related, however.[1] As applicants Nguyen and Schaud meet the stated minimum requirements for the Auto Mechanic position, and Employer did not state that the Mechanic position required experience with transmissions in its application on Form ETA 750 Part A or recruitment advertisements, Employer's application for labor certification must be denied and the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

[1]Moreover, Employer's assertion that it is difficult or inconvenient to train the applicants is not sufficient to sustain its burden of proof on that issue. **Highland Plating Co.**, 92-INA-264 (May 25, 1993).

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: **BEST TRANSMISSIONS, Employer**
JOSE G. PADILLA, Alien

Case No. : 95-INA-263

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: January 22, 1997